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No. 1115

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In the Supreme Court of the United States

OCTOBER TERM, 1967

IVORY COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1967. Mr. Justice Douglas extended the time for filing a petition for a writ of certio-

rari to February 14, 1968, and on February 14, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether possession of the illicit drugs by petitioner was proved.

2. Whether there was any evidence of entrapment to require an instruction thereon.

3. Whether cross-examination of petitioner concerning his previous felony conviction for possession of marijuana was admissible on the question of petitioner's credibility.

STATEMENT

After a jury trial in the Central District of California, petitioner was convicted on four counts of an indictment which charged that on March 9 and April 6, 1965, he knowingly concealed and sold narcotics (21 U.S.C. 174). On October 11, 1965, he was sentenced to confinement for twenty years.

Informant Albert Johnson, who was then under indictment for a narcotic offense (Tr. 81), had discussed petitioner with federal narcotic agents and was asked to try to buy narcotics from petitioner (Tr. 85). Johnson visited petitioner and said that he "wanted to buy a piece of stuff" (Tr. 64). After petitioner replied "O.K.", Johnson asked him the price and was told $300 (Tr. 65). A "piece of stuff" signifies one ounce of heroin (Tr. 65, 132).

A few days later, on March 9, 1965, Johnson called petitioner's telephone number, and, with a federal

agent listening in (Tr. 114), told petitioner he "was ready" (Tr. 67). Petitioner told Johnson to come to his house (Tr. 67). Johnson and his car were searched and Johnson was given $300 in federal funds (Tr. 115). Upon meeting, petitioner asked if Johnson had the money, and later asked for and received the money (Tr. 68). Both men, in separate cars, then drove to a taco stand where petitioner delivered a napkin and a rubber containing a powder (Tr. 69). Johnson delivered these to the federal agent. A field test of the powder gave a positive reaction for a heroin derivative (Tr. 127).

On April 6, 1965, Johnson, using a telephone attachment which permitted the federal agent to listen, called petitioner's number and again told petitioner he wanted to buy a piece of stuff (Tr. 74). They arranged to meet at a park (Tr. 74). Once more Johnson and his vehicle were searched with negative results and he was given a second $300. The federal agent also attached a transmitter device to Johnson (Tr. 75), permitting the agent to hear Johnson's later conversations with petitioner (Tr. 135-137).

Upon meeting, Johnson gave petitioner the government money (Tr. 75) and petitioner told him that "the stuff" was in a phone booth (Tr. 76). Johnson was unable to locate it there and petitioner then told him it was above the door (Tr. 77). Johnson found there a rubber condum with powder, and shortly thereafter turned it over to the federal agents (Tr. 78). It also gave a positive reaction to the heroin field test performed by the agent (Tr. 138).

In each instance Johnson and his car were under constant visual surveillance by the federal agents

from the time the money was given to him until the powder was surrendered to the agents (Tr. 116-127, 152).

Both Johnson and the federal agent testified that petitioner told Johnson of an intended trip to Mexico (Tr. 78, 137) to buy narcotics; that it was his plan, from then on, to have Johnson call him; and that he would tell Johnson where he "was going to have the stuff stashed" (Tr. 136, 78).

Petitioner, testifying in his own behalf, acknowledged both meetings with Johnson but said these concerned arguments with Johnson concerning Johnson's wife (Tr. 166). Petitioner denied sales, receipt of money, any planned trip to Mexico, and said that Johnson had threatened to "get" him (Tr. 172).[1]

On cross-examination it was brought out that petitioner had two previous felony convictions (Tr. 193). One conviction was for possession of marijuana (Tr. 196). Defense counsel agreed that the previous drug conviction was admissible on the question of petitioner's credibility (Tr. 199).

ARGUMENT

1. The argument that the evidence did not show actual or constructive possession by petitioner is refuted by the record. Johnson testified that petitioner de-

[1] Ruth Johnson testified as a defense witness that Johnson had threatened petitioner (Tr. 203). Letters she had written and utterances she had made, expressing fear of petitioner, were used as prior inconsistent impeaching statements (Tr. 220, 226, 229, 237, 240). In rebuttal Johnson testified as to threats made against him by petitioner (Tr. 232). Petitioner, in sur-rebuttal, denied this (Tr. 242).

livered the drugs to him on the first occasion, and instructed where the drugs were hidden on the second. Johnson was corroborated by the federal agents who searched Johnson and his car before the transaction, kept him under surveillance and, after his meetings with petitioner, ascertained that he had acquired drugs. Since petitioner, on the second occasion, was able without difficulty to cause the drugs to be produced for a customer, the jury could find that he had dominion and control thereof. *Cellino* v. *United States*, 276 F.2d 941 (C.A. 9); *United States* v. *Malfi*, 264 F.2d 147 (C.A. 3), certiorari denied, 361 U.S. 817.

2. There was no reason for an instruction on entrapment. Whether or not such an instruction is appropriate where a defendant denies commission of the offense,[2] there was no evidence of entrapment in this case. The informant testified that he asked petitioner to sell him narcotics and petitioner immediately agreed to do so. Petitioner denied any transaction in narcotics. On neither version was there any evidence of inducement of an innocent to engage in crime. Cf. *Sherman* v. *United States*, 356 U.S. 369. No entrapment takes place when an informant merely asks to purchase narcotics. *Lewis* v. *United States*, 385 U.S. 206, 208; *Grimm* v. *United States*, 156 U.S. 604; *Kibby* v. *United States*, 372

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[2] The rule in the Ninth Circuit is that in this circumstance there can be no defense of entrapment. *Ortiz* v. *United States*, 358 F.2d 107 (C.A. 9), certiorari denied, 385 U.S. 861; *Ortega* v. *United States*, 348 F.2d 874 (C.A. 9). But see *Sears* v. *United States*, 343 F.2d 139, 144 (C.A. 5); *Hansford* v. *United States*, 303 F.2d 219 (C.A.D.C.).

F.2d 598 (C.A. 8), certiorari denied, 387 U.S. 931; *United States* v. *Riley*, 363 F.2d 955 (C.A. 2); *United States* v. *Alford*, 373 F.2d 508 (C.A. 2), certiorari denied, 387 U.S. 937.

3. Evidence of petitioner's prior conviction for possession of marijuana was brought out on cross-examination without objection after petitioner had voluntarily taken the witness stand to deny the occurrences related by the informant. Such a prior conviction for an offense of moral turpitude was admissible as a reflection on petitioner's credibility, and the trial court instructed as to this limited purpose (Tr. 278). *United States* v. *Ramsey*, 315 F.2d 199 (C.A. 2), certiorari denied, 375 U.S. 883; *Patterson* v. *United States*, 368 F.2d 331 (C.A. 5), certiorari denied, 386 U.S. 932. Cf. *Gordon* v. *United States*, 383 F.2d 936 (C.A.D.C.).[3]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] The cases cited by petitioner (Pet. 14) are inapposite because they deal with mere arrests and innuendos of improprieties, not conviction for felony.

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